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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JEFFREY PIRO,

Plaintiff and Appellant,

v.

GARY K. PIRO, as Trustee, etc.,

Defendant and Respondent.

D052776

(Super. Ct. No.  
37-2007-00100321-PR-TR-NC)

APPEAL from an order of the Superior Court of San Diego County, David G. Brown, Judge. Affirmed.

Jeffrey Piro (Jeffrey), one of three equal beneficiaries of a trust established by his mother (the Trust), petitioned under Probate Code<sup>1</sup> section 17200 for an order compelling the Trustee of the Trust, his brother Gary Piro (Gary), to distribute one-third of the Trust assets in kind to Jeffrey. The petition also sought orders denying Gary any

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<sup>1</sup> All further statutory references are to the Probate Code unless otherwise specified.

compensation, enjoining Gary from incurring any costs for appraisers or legal fees on behalf of the Trust, and other relief. Jeffrey subsequently filed a supplemental petition seeking additional orders removing Gary as Trustee, for an accounting, and for restitution of funds allegedly spent by Gary in violation of his Trustee obligations. Gary's responses sought an order denying all relief sought by Jeffrey, and affirmatively sought an order (1) permitting all of the Trust's interests in real property to be sold, (2) authorizing payment of Trustee and attorney fees and (3) for costs as sanctions against Jeffrey. The court granted Gary's request for an order permitting the Trustee to sell the Trust's real property (and conversely denying Jeffrey's request for distribution of the real property in kind), approved Trustee fees to Gary and attorney fees to the attorneys for the Trust, and set a further hearing to resolve the remaining disputes between the parties. Jeffrey timely appealed the order.

## I

### FACTUAL AND PROCEDURAL OVERVIEW

#### A. Factual Context<sup>2</sup>

##### *The Trust*

In 1996, Mildred Piro established the Trust. Her three sons (Jeffrey, Gary and Gerald) were equal beneficiaries, and Gary was designated the Trustee. Under the Trust

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<sup>2</sup> Many of the relevant facts are undisputed. However, to the extent the facts are in dispute, we must accept the trial court's resolution of any factual disputes because Jeffrey has forfeited any claim that the trial court's resolution lacked substantial evidentiary support. (See section II.C, *post*.)

instrument, the Trustee was granted the power to continue holding any property received in trust, the right to be compensated for performing as Trustee, the power to defend legal actions against the Trust and to employ legal counsel for the Trust, and to pay counsel from the Trust assets.

The principal assets of the Trust were interests in four parcels of real property. The Trust owned partial interests in three properties in Oceanside, California.<sup>3</sup> The Trust was also the sole owner of a house in North Hollywood, California.

Article IV.F.6 of the Trust provided the Trustee "shall distribute" to a beneficiary his interest in the Trust when the beneficiary attains the age of 55 "[s]ubject to a possible retention of some or all of the assets of the trust estate by the Trustee pursuant to Article VI.S. . . ." The proviso set forth in Article VI.S. permits the Trustee to "withhold from distribution . . . all or any part of the property, so long as the Trustee shall determine, in the Trustee's discretion, that such property may be subject to conflicting claims . . . ."

### *The Disputes*

After Mildred's death, the other owners of the fractional interests in the Oceanside properties found themselves mired in disputes with Jeffrey over the properties, including how to manage the properties and how to value the Trust assets for purposes of distributing the respective shares to Jeffrey and the other Trust beneficiaries. Between

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<sup>3</sup> The Trust owned an undivided one-fourth interest in a single family rental unit, an undivided one-fourth interest in a two-unit rental property, and an undivided one-half interest in a four-unit rental property. The remaining undivided ownership interests in the Oceanside properties were owned by other relatives.

2004 and 2007, the parties discussed numerous proposals for dividing the Trust properties among the Trust beneficiaries, but they were unable to agree on the appropriate valuations to be assigned to each property interest held by the Trust that would permit in-kind distributions to be made on an equal basis.<sup>4</sup>

In the fall of 2007, Gary scheduled a mediation between the parties to reach a global resolution of the appropriate methods to value and accomplish equal distributions of the Trust assets. However, Jeffrey canceled the mediation and proposed, apparently for the first time, that he be given a one-third distribution in kind of each of the Trust assets. Gary discussed Jeffrey's proposal with Gerald and with the other fractional owners of the Oceanside properties. All were opposed to an in-kind distribution to Jeffrey.

#### B. The Litigation

Jeffrey's initial petition sought an order (1) compelling the Trustee to make an in-kind distribution to Jeffrey of one-third of each of the Trust's real property holdings, (2) to deny Gary any Trustee fees, (3) to enjoin Gary from incurring any costs for appraisers or attorneys, (4) to enjoin Gary from committing any breach of the Trust, and (5) to appoint a receiver and for costs. In a supplemental petition, Jeffrey also sought orders (1) removing Gary as the Trustee, (2) for an accounting, and (3) for restitution of funds

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<sup>4</sup> For example, one iteration proposed that Jeffrey would receive the North Hollywood house, but because its valuation indicated it was worth nearly \$50,000 more than Jeffrey's one-third share of the Trust assets, Gary proposed that Jeffrey take the North Hollywood house but make an equalization payment to Gary and Gerald. That proposal was not accepted by Jeffrey.

allegedly used improperly by the Trustee, including legal fees paid to counsel for the Trust. Gary opposed all relief sought by Jeffrey, and affirmatively sought an order (1) permitting Gary to sell the Trust's interests in the real property, (2) authorizing payment by the Trust of Trustee fees and attorney fees, and (3) ordering, under section 15642, subdivision (b)(6), that Jeffrey pay attorney fees incurred by the Trust in defending against Jeffrey's attempt to remove Gary as Trustee.

The court's February 29, 2008, order (1) granted Gary's request for an order permitting the Trustee to sell the Trust's real property (concomitantly denying Jeffrey's request for distribution of the real property in kind), (2) approved Trustee fees to Gary for services through December 29, 2007, in the amount of \$45,000, and (3) approved attorney fees to the attorneys for the Trust for services rendered through January 31, 2008. The court also ordered a continuance on the remaining issues raised by the parties and set a hearing for May 23, 2008, at which it would make a final ruling on those remaining issues. Jeffrey appealed.

## II

### ANALYSIS

#### A. Issues on Appeal

Jeffrey appears to argue the court did not have authority to authorize Gary to sell the real property assets held by the Trust because the terms of the Trust required Gary to accede to Jeffrey's demand that Jeffrey receive in-kind distributions of one-third of each Trust asset. Jeffrey also argues the court erroneously awarded Trustee fees to Gary

because Gary waived those fees, and it was error to award attorney fees because those fees were unnecessary.

Jeffrey also appears to attempt to raise other issues in this appeal, including whether the court erroneously refused to remove the Trustee because of alleged misfeasance. Although this relief was included within the relief sought by Jeffrey's initial and supplemental petitions, the court's order of February 29, 2008, (from which Jeffrey filed this appeal) expressly deferred consideration of those issues until a subsequent hearing,<sup>5</sup> and was limited to ordering the Trust real property sold and approving interim fees to the Trustee and the attorneys. Because the court characterized its February 29 order as an interim order, and addressed only the limited questions of the sale of real property and fees, Gary has moved to dismiss the *entire* appeal, arguing the only orders made appealable by section 1304, subdivision (a), are final orders entered under section 17200 et seq.<sup>6</sup> Although certain aspects of the February 29, 2008, order may not have been final (because the court contemplated further proceedings on other issues posed by

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<sup>5</sup> Gary requested we take judicial notice of three documents, including the subsequent order by the court issued after the subsequent hearing. We take judicial notice of the subsequent order issued on July 2, 2008, addressing the additional matters raised by Jeffrey and Gary. Jeffrey's appeal from that order is the subject of another appeal (*Piro v. Piro* (Feb. 27, 2009, D053529) [nonpub. opn.]) considered concurrently with the present appeal. However, we deny the balance of Gary's request for judicial notice because that evidence is moot.

<sup>6</sup> Gary also seeks sanctions, arguing that because the appeal must be dismissed, the appeal a fortiori constitutes a frivolous appeal. Because we deny in part the motion to dismiss, we cannot conclude the appeal is frivolous, and therefore deny the motion for sanctions.

Jeffrey's petition), the Probate Code expressly makes appealable a court order that fixes and authorizes the payment of trustee's fees (§ 1300, subd. (f)) or attorney fees (*id.* at subd. (e)), as well as an order authorizing the sale of property (*id.* at subd. (a)). Gary provides no explanation of why those sections are inapplicable here, or any argument that further proceedings were contemplated as to those three aspects of the February 29, 2008, order, and we therefore construe those orders as final and appealable. (Cf. *Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755 [construing order as appealable where it has "all the earmarks of a final judgment [and] [n]othing remains for judicial consideration" on the subject matter of the appealed order].)

We conclude the proper approach is to dismiss the appeal insofar as Jeffrey seeks to address the nonappealable aspects of the February 29 order, including the deferred rulings on the issues of removal of the Trustee and the attempt to enjoin Gary from breaching the Trust.<sup>7</sup> However, we deny the motion to dismiss the appealable aspects of the order and limit our review to the appealable portions of that order. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20 [" 'When a party appeals from both appealable and nonappealable orders, courts in this state regularly dismiss the appeal from the latter order' . . . [and proceed] to consider the

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<sup>7</sup> Jeffrey argues that because section 1300, subdivision (g), provides an appeal may be taken from "the refusal to make" an order to "remov[e] . . . or discharge[e] a fiduciary," he contends the court's refusal to remove Gary as Trustee is properly considered in this appeal. However, the February 29 order did not refuse to order Gary removed as Trustee, but merely deferred consideration of that issue until the later hearing, and therefore section 1300, subdivision (g), does not authorize Jeffrey to raise this issue in the current appeal.

appeal based on the other, properly filed notice of appeal from the judgment."].)

Accordingly, we consider only the rulings from which the appeal was properly taken, which limits our examination to whether the court erred by (1) ordering the Trust real property sold, (2) approving Trustee fees, and (3) approving attorney fees.

#### B. The Real Property Order

Jeffrey's principal assertion appears to be that the court erred when it approved Gary's request to sell the Trust's real property interests, arguing the Trust required Gary to distribute the real property to him in kind when Jeffrey reached 55 years of age. Assuming this argument is preserved, we conclude the trial court's order was not erroneous.

The Trust grants to the Trustee a variety of discretionary powers, including the power to retain property held by the Trust (Trust, Article VI.A.) or to sell property held by the Trust (Trust, Article VI.B.). The Trust also granted to the Trustee the "power[] and discretion," "[u]pon any division or distribution of the trust estate, to . . . allot and distribute the trust estate in undivided interests or in kind, or partly in money and partly in kind, at valuations determined by the Trustee, and to sell such property as the Trustee may deem necessary to make division or distribution. . . ." (Trust, Article VI.H.)

On appeal, Jeffrey raises no coherent argument explaining how sale of the Trust assets either violates the terms of the Trust or is barred by any provision of law.<sup>8</sup>

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<sup>8</sup> Instead, it appears Jeffrey's argument is that Gary sought the order as part of an ongoing scheme to force Jeffrey to accept less than his one-third share of the actual value of the Trust assets. However, this claim does not undermine the court's authority to order



Accordingly, any claim of error as to this aspect of the order is waived. (See generally *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived"].) Moreover, even assuming this claim was preserved, the terms of the Trust expressly authorized the Trustee to sell property held by the Trust, and expressly granted the Trustee the discretion to "sell such property as the Trustee may deem necessary to make division or distribution." Accordingly, the court did not err in authorizing Gary to sell the Trust's real property interests as a preliminary step to accomplishing the required distribution to Jeffrey.

### C. The Trustee Fees

The Trust agreement provided that Gary was entitled to "compensation for [his] services, unless waived, [in the] amount of commissions as are customarily being charged by commercial trust companies for services as a trustee . . . ." Gary's evidence in support of his request for Trustee fees showed, based on the value of the Trust over the three and one-half year period for which he was Trustee (during which time he spent nearly 400 hours on Trust issues), he was entitled to between \$52,000 (employing the informal guidelines applied by Northern San Diego County courts) and \$104,000 (employing the 2 percent formula charged by commercial trustees) in fees. However, Gary sought only

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the assets sold. Indeed, until such time as Gary makes a final distribution to Jeffrey as his final and complete share of the Trust, any claim by Jeffrey that Gary breached his fiduciary obligations by distributing to Jeffrey less than was actually due him is premature.

\$45,000, and the trial court approved this amount, finding it "fair and reasonable [and] substantially less than the . . . fees permitted by the Trust Agreement . . . ."

Jeffrey argues the trial court erred in approving Gary's request for Trustee fees because Gary waived those fees. However, the trial court specifically found substantial evidence was presented that Gary did *not* waive his right to fees. Because Jeffrey's opening brief ignores the evidence presented by Gary, and instead recites only the evidence Jeffrey submitted at trial to support his claim of waiver, we do not further consider his claim that no substantial evidence supported the trial court's finding.

(*Brockey v. Moore* (2003) 107 Cal.App.4th 86, 96-97.)

However, even were we to consider this issue, substantial evidence supports the finding. In the only correspondence submitted in evidence below, Jeffrey admitted Gary told him that Gary intended to "charg[e] the estate the customary fee" for administering the Trust, and Gary confirmed he would be requiring compensation. Gary also advised Jeffrey that Trustee fees would not cease until the Trust was terminated. Although Gary did offer to waive fees *if* the parties were able to reach a global settlement, the collapse of the negotiations over a negotiated distribution meant the condition precedent to Gary's offer to waive fees never materialized. Substantial evidence supported the trial court's determination that Gary did not waive his entitlement to Trustee fees.

Jeffrey also appears to assert the *amount* of the award was unreasonable. However, a court order allowing compensation to a trustee "rests in the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of a manifest showing of abuse." (*Estate of McLaughlin* (1954) 43 Cal.2d 462, 465.)

Because the amount awarded was below the amount specified in the Trust,<sup>9</sup> and was also below the amount established by the court's guidelines, Jeffrey has not carried his burden of showing the amount awarded was a manifest abuse of discretion.

D. The Attorney Fees

Gary sought an order approving payment of attorney fees incurred by the Trust through January 31, 2008, for services rendered to the Trust in connection with attempting to resolve the distribution issues and in defending against Jeffrey's initial and supplemental petitions. The court approved the attorney fees request, and Jeffrey on appeal argues that order was error because the attorney services provided no value to the Trust.

Under both the terms of the Trust<sup>10</sup> and under California law (see 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 60, p. 634), an attorney acting on behalf

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<sup>9</sup> Jeffrey notes Gary had only paid himself \$2,000 through mid-2007, and therefore argues Gary was barred from charging any more than \$2,000 by section 15686, subdivision (b). However, that provision merely specifies that a trustee cannot charge an increased fee for administering a trust unless he or she has given 60 days' written notice to all beneficiaries of the increased fee, which subdivision (a) defines as the "trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge." Thus, although subdivision (b) would apply if Gary sought an increased trustee fee *rate* above the fees authorized by the Trust (e.g. the "amount of commissions as are customarily being charged by commercial trust companies for services as a trustee"), Gary actually requested *less* than that amount, and therefore section 15686 has no application here.

<sup>10</sup> Article VI.K. of the Trust grants the Trustee discretion to hire and pay for attorneys from Trust funds, and Article VI.R. grants the Trustee discretion to commence or defend litigation involving the Trust and to pay for such litigation from the Trust assets.

of the Trust is entitled to reasonable fees for services rendered in connection with administering the Trust. Gary was authorized to use Trust funds to pay for legal advice regarding Trust administration (§ 16247) and therefore the court's order approving payment of fees from the Trust was legally permissible.

Jeffrey argues the attorney fees were unnecessary because the affirmative relief sought by Gary--an order authorizing Gary to sell the Trust's assets--was something "to which Jeffrey immediately agreed," and therefore the attorney fees were unnecessary. However, Jeffrey cites nothing in the record reflecting an "immediate agree[ment]," and his statements at the hearing belie that claim.<sup>11</sup> Moreover, Jeffrey's petition and supplemental petition raised additional claims of misfeasance (and sought additional relief) against the Trustee, and the Trustee was entitled to defend against those claims for the benefit of the Trust and at the Trust's expense. (See generally *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 99 [upholding attorney fees for trustee incurred to defend allegations seeking removal of trustee because although the defense benefited the trustee personally it "also benefited the trust by eliminating charges raising serious questions about whether she had and could continue to administer the trust properly"]; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 213.) Under these circumstances, we are

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<sup>11</sup> For example, at the February 22 hearing, Jeffrey stated that he was "not opposed to a sale, *but I would like my undivided interest distributed first.*" (Italics added.) At the end of the hearing Jeffrey stated that "I wanted the property. I didn't ask for it to be sold. That's important it goes into the record," from which the trial court could infer he remained opposed to selling the property rather than obtaining the in-kind distribution.

not persuaded by Jeffrey's claim that the order approving attorney fees through January 31, 2008, was an abuse of the court's discretion.

#### DISPOSITION

The order authorizing Gary to sell the Trust's real property interests, approving payment of Trustee fees of \$45,000 through December 29, 2007, and approving payment of attorney fees through January 31, 2008, of \$1,715.75 to attorney William Pulz and \$17,989.12 to the Law Offices of Wesley Pelzer is affirmed. Gary is entitled to costs on appeal.

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McDONALD, J.

WE CONCUR:

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NARES, Acting P. J.

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HALLER, J.